87-912

NO.

Supreme Court, U.S.
FILED
NOV 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARGARET KINZLI, *et al.*,
Petitioners,

v.

CITY OF SANTA CRUZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARBARA R. BANKE
JESS S. JACKSON
50 Francisco St., Suite 445
San Francisco, CA 94133
415-392-2424

Attorneys for Petitioners

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

When the District Court has found as a matter of fact after trial of an inverse condemnation case that a further application for development would be futile, whether such action is ripe for review.

Whether a development application is required to make an action ripe for review when the ordinance applicable to the property allows no viable economic use.

Whether the lower courts erred in finding that holding property for investment during the effective period of an ordinance when there is no possibility of profit in the interim is a viable economic use.

II

PARTIES

Petitioners are Margaret Kinzli and her children Evelyn Goosen, Philip Kinzli and Ernest Kinzli.

Respondent is the City of Santa Cruz, California.

TABLE OF CONTENTS

CASE PAGE

OPINIONS BELOW..... 2

STATEMENT OF JURISDICTION..... 2

STATUTES INVOLVED IN THIS CASE..... 3

STATEMENT OF THE CASE..... 3

BASIS OF JURISDICTION IN FEDERAL COURT..... 11

ARGUMENT..... 11

I. THE NINTH CIRCUIT OPINION IS INCONSISTENT WITH THE OPINION OF THIS COURT IN *FIRST ENGLISH EVANGELICAL CHURCH v. COUNTY OF LOS ANGELES*..... 11

A. This Court Held That When An Ordinance Premits No Reasonable Beneficial Use Of A Property, The Validity Of The Ordinance May Be Ripe For Review Without The Necessity Of A Development Application..... 12

B. The Ninth Circuit Misinterpreted This Court's Opinion In *Williamson County v. Hamilton Bank* To Hold That A Formal Application Is Always Required As A Prerequisite To An Inverse Condemnation Suit..... 23

C. When As Here There Is A Factual Finding After Trial That A Further Application For Development Would Be Futile, The Plaintiff Is Not Required To Engage In An Idle Act.

II. THE NINTH CIRCUIT COURT OF APPEALS DECISION WILL HAVE THE EFFECT OF PRECLUDING ACTIONS BY PROPERTY OWNERS WHO HAVE BEEN DENIED ECONOMICALLY VIABLE USE OF THEIR PROPERTY BY GREEN BELT OR OPEN SPACE ORDINANCES..... 30

A. The Concept Of Economically Viable Use Requires That The Property Owner Have The Ability To Use The Property In Some Profitable Manner During The Effective DAtes Of The Ordinance..... 30

B. When The District Court Finds As A Matter Of Fact After Trial That The Property Owner Can Make No Profitable Use Of Her Property During The Pendency Of The Ordinance, No Application Is Required..... 32

C. The City's Acts In Singling Out Mrs. Kinzli's Property To Remain An Island Of Undeveloped Land In The Middle Of An Urban Area Violate The Fifth Amendment..... 38

CONCLUSION..... 42

TABLE OF AUTHORITIES

CASE PAGE

Agins v. City of Tiburon
447 U.S. 256 (1980)..... 14

Armstrong v. United States
364 U.S. 40, 80 S.Ct. 1563 (1960).. 39

First English Evangelical Lutheran Church v. County of Los Angeles
107 S.Ct. 2378 (1987)
. 3, 12-14, 17-18, 20, 23, 26-27 29, 30

Kaiser Development v. City & County of Honolulu
649 F.Supp. 926 (D.Haw. 1987)..... 40

Keystone Bituminous Coal Assn. v. DeBenedictis
107 S.Ct. 1232, 94 L.Ed.2d 472, (1987)
..... 19, 29

MacDonald, Sommer & Frates v. Yolo County
106 S.Ct. 2561 (1986)
..... 14, 23, 25, 26, 32-35, 39

Penn Central Transportation Co. v. New York City
438 U.S. 104, 98 S.Ct. 2646 (1978)
..... 19, 39

San Diego Gas & Elec. Co. v. City of San Diego
450 U.S. 621 (1981)
..... 14, 19, 33-34, 36-38

Santa Fe Land & Development Co. v. Berkeley
___F.Supp.___ (N.D.Cal. 1987)..... 40

Williamson County Regional Planning Commission v. Hamilton Bank
473 U.S. 172 (1985)..... 14, 23, 27, 39

STATUTES AND RULES

U.S. Const. amend. V..... ..... Passim

U.S. Const. amend. XIV..... Passim

28 U.S.C. §1254(a)..... 3

28 U.S.C. §1257..... 3

28 U.S.C. §1331(a)..... 11

42 U.S.C. §1983..... 11

Santa Cruz Mun. Code
§24.53.2000 *et al.* (1981)..... 8-9

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARGARET KINZLI, et al.,
Petitioners,

v.

CITY OF SANTA CRUZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Court of Appeals opinion is reported at 818 F.2d 1449 (9th Cir. 1987) and is reprinted at page A-1 of the Appendix submitted herewith.

The opinion of the United States District Court for the Northern District of California is reported at 620 F.Supp. 609 (N.D.Cal. 1985) and is reprinted at page A-18 of the Appendix submitted herewith.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered judgment in 1987. A petition for rehearing was timely filed. On August 31, 1987, the Court of Appeals entered an order denying that petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

STATUTES INVOLVED IN THIS CASE

The action concerns Measure O, an ordinance of the City of Santa Cruz, which is a statute of a state for purposes of 28 U.S.C. §1257. *First English Evangelical Luthern Church v. Los Angeles County*, ___U.S.___, 107 S.Ct. 2378, 2385 (1987).

STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals has issued an opinion which is contrary to decisions of this Court and which creates an overbroad and insurmountable burden to judicial review of open space land use regulations.

The Court of Appeals held that owners of a property designated as open space by an initiative and permitted only unprofitable open space uses could not challenge the initiative unless they applied for one of the unprofitable uses permitted under the initiative. This requirement of applying for unprofitable uses is to be imposed in all cases without regard to whether there is no possibility of an economic use under the ordinance and whether the application would be futile.

The dispute involves the the following facts:

Margaret Kinzli and her family petition as the owners of 62 acres of real property situated in the City of

Santa Cruz, California. The property is the major asset of Mrs. Kinzli, an octogenariam widow and her three children. It was formerly used as a dairy farm but during the 1960's and early 1970's, due to growth of the City of Santa Cruz, the property became an island of undeveloped property surrounded by urban development. The property does not produce a profit as potential income does not exceed the property taxes.

On March 6, 1979 the voters of the City adopted an initiative ordinance entitled "City of Santa Cruz Measure O Greenbelt and Low Growth General Plan Policy Ordinance" (Measure O). Subsequently the City Council enacted two ordinances implementing Measure O: 1) A

moratorium ordinance No. 79-9 adopted March 13, 1979; and 2) Ordinance No. 80-02 adopted January 22, 1980, effective February 21, 1980 commonly known as the Greenbelt Overlay Ordinance (hereafter "GBO").

The Kinzli property is one of six specific parcels targeted within the greenbelt as described in Measure O. While the remaining five parcels subject to Measure O form a ridge or belt along the north and northwest City limits of Santa Cruz, the Kinzli property is the only greenbelt property completely surrounded by urban development.

Measure O limits the uses to which greenbelt land can be put through the

year 1990; Sec. 3 of the Measure provides for the following uses:

1) Timber production and harvesting

2) Agriculture, including grazing

3) Private recreation

4) Public recreation

5) Wildlife habitat

6) Watershed or groundwater recharge

7) Scientific or educational purposes which maintain the open space character of the land

8) Other uses which maintain the open space character of the land.

In addition, Sec. 4 of Measure O prohibits the City from providing additional urban services, including

water, sewer and roads to these lands. Any urban use would require extension of services.

Apparently in an attempt to foreclose any modification of the initiative by City officials, Measure O also provides that no part of it "shall be amended or repealed except by a vote of the people." The Measure then goes on to require the City to revise the General Plan in accordance with the Measure within nine months of its effective date.

Approximately nine months after Measure O, the Council adopted the Greenbelt Overlay Ordinance ("GBO"). Santa Cruz Mun. Code Ch. 24.53, §24.53.2000 (1981). Restating the provisions of Measure O, the GBO allows

the same uses as Measure O but allows in addition Single-family dwellings and Accessory buildings *Id.* §24.53.2010. The adding of such family residences and accessory buildings is violative of Measure O's provision that it could not be amended without vote of the people, and therefore is void.

The District Court found after a six-week trial that all these uses uneconomic and unavailable, particularly given that Measure O prohibited roads and public services. The Ordinance then provides that any other uses "may be allowed by special use permit" if it is of the same general character as the uses enumerated and if it conforms to the purpose and intent of the Ordinance.

As the District Court found, the Kinzlis themselves never made application for a permit for any uses under Measure O. They were not financially or otherwise able to engage in any substantial development of the property. Nor would any prudent developer be interested in applying for uses under Measure O.

Nevertheless, the Ninth Circuit Court of Appeals held an application for one of the unprofitable Measure O greenbelt uses was a prerequisite to litigation. Effectively this decision was foreclosed Mrs. Kinzli and similarly situated litigants to a rational application process and meaningful access

to the courts to challenge the greenbelt initiative.

BASIS OF JURISDICTION IN FEDERAL COURT

The basis of jurisdiction in the United States District Court was pursuant to the Civil Rights Act, 42 U.S.C. §1983, and 28 U.S.C. §1331(a).

ARGUMENT

I.

THE NINTH CIRCUIT OPINION IS INCONSISTENT WITH THE OPINION OF THIS COURT IN *FIRST ENGLISH EVANGELICAL CHURCH* v. *COUNTY OF LOS ANGELES*

A. This Court Held That When An Ordinance Permits No Reasonable Beneficial Use Of A Property, The Validity Of The Ordinance May Be Ripe For Review Without The Necessity Of A Development Application.

In *First English Evangelical Lutheran Church v. County of Los Angeles*, ___ U.S.___, 107 S.Ct. 2378 (1987), this Court clearly held that if a property has no beneficial use under a regulation, then it is not necessary that the property owner apply for a development as the action is already ripe for judicial review.

The record of *First English Evangelical Lutheran Church* shows that there was no application for development filed by the property owner. See Brief of Appellee in that action, particularly

pp. 21-23. In fact, in that action, one month after the passage of Interim Regulation 11,855 by the County of Los Angeles the property owner filed a lawsuit challenging the validity of the regulation. The property owner alleged that the Ordinance denied it all use of its property. This Court accepted this allegation as true and held that the action was ripe for review. 107 S.Ct. at 2383-2384.

In fact, in *First English Evangelical Lutheran Church* the record is replete with evidence that the ripeness issue and the lack of development application was argued extensively by the County of Los Angeles as a basis for the dismissing the appeal.

Nevertheless, in *First English Evangelical Lutheran Church* this Court distinguished between cases where it had held that there was not a question ripe for review, such as *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. ____, 106 S.Ct. 2561 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); and *Agins v. City of Tiburon*, 447 U.S. 256 (1980).

> Concerns with finality left us unable to reach the remedial question in the earlier cases where we had been asked to consider the rule of *Agins*. *See MacDonald, Sommer & Frates, supra*, 477 U.S. ___, 105 S.Ct. at ___ [summarizing cases]. In each of these cases we concluded either that regulations considered

in issue by the state court did not effect a taking, *Agins v. Tiburon, supra,* 24 Cal.3d at 263, 157 Cal.Rptr. 372, 598 P.2d 25, or that the factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred, *MacDonald, Sommer & Frates, supra,* 477 U.S. at ____; *Williamson County, supra,* 473 U.S. at ___, 105 S.Ct. at ____; *San Diego Gas & Elec., supra,* 450 U.S. at 631-632, 101 S.Ct. at 1293-1294. Consideration of the remedial question in those circumstances we concluded we would be premature. The posture of the present case is quite different. Appellants' complaint allege that, "Ordinance No. 11,855 denies [it] all use of Lutherglen," and sought damages for this deprivation. App. 12, 49. In affirming the decision to strike this allegation, the Court of Appeals assumed that the complaint sought damages for the uncompensated taking of all use of Lutherglen by County Ordinance No. 11,855. [Cite omitted.]

It relied on the California Supreme Court's *Agins* decision for the conclusion that, "The remedy for a taking [is limited] to non-monetary relief ..." *Id.* at p. A-16. [Emphasis added.] The disposition of the case on these grounds isolates the remedial question for our consideration. The rejection of appellants' allegations did not rest on the view that they were false. *Cf. MacDonald Sommer & Frates, supra,* at ____, n.8, 106 S.Ct. at 2568, n.8. [California court rejected allegation in the complaint that appellant was deprived of all beneficial use of its property]; *Agins v. Tiburon,* 447 U.S. at 259, n. 6, 100 S.Ct. at 2141, n.6 [same]. Nor did the Court rely on the theory that regulatory measures such as Ordinance 11,855 may never constitute a taking in the constitutional sense. Instead the claims were deemed irrelevant solely because of the California Supreme Court's decision in *Agins* that damages are unavailable to redress a

"temporary regulatory taking."

107 S.Ct. at 2383-2384.

Given the factual findings of the District Court herein, the present action is substantially identical to that of *First English Evangelical Lutheran Church*.

The District Court held that none of the uses available under the regulation Measure O were viable economically. 620 F.Supp at 614-615. The District Court further held factually that any development application would be futile as there was no possibility that the Kinzlis could apply for any potential use, 620 F.Supp. at 613, or that they could interest any prospective purchaser in applying for any use under Measure O.

620 F.Supp. at 620. Nevertheless, the District Court went on to hold that Measure O allowed Margaret Kinzli a viable use of her property solely and only on two untenable grounds that, per *First English Evangelical Lutheran Church, supra,* require reversal: (1) That Mrs. Kinzli's property was not taken because she could expect some (speculative) future private use after the demise of the subject 10 year regulation (rather than during it) and thus hold the property for investment; and (2) That Mrs. Kinzli could realize a profit upon a sale after Measure O was terminated or in the event it was repealed. The District Court correctly held that it would have been futile to

apply for a use under Measure O if Measure O allowed no beneficial use of the property. The District Court erred when it expanded the definition of "beneficial use" beyond that applied by this Court in such cases as *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 107 S.Ct. 1232, 94 L.Ed.2d 472, (1987); and the dissent in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981).

In fact, this Court held in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 107 S.Ct. at 1247-1248, that an economically viable use means a profitable use of property under the regulation.

Just four days before *First English Evangelical Lutheran Church* was announced, the Ninth Circuit Court of Appeals concluded in this action that a development application was always a condition precedent to a taking claim.

> ... Therefore, the "final decision" which inflicts a concrete injury on the plaintiff and is ripe for adjudication as a claim of a regulatory taking, even if the claim is brought under 42 U.S.C. §1983, requires at least two decisions against the Kinzlis: (1) a rejected development plan, and (2) a denial of a variance. *Hamilton Bank*, 105 S.Ct. at 3117-18. The Kinzlis have not secured or even attempted to secure either of these two requisite decisions.
>
> Nevertheless, their takings claim may be ripe under the Ninth Circuit's "futility exception" to the threshold requirement of a final decision. Under this exception, the requirement if

the submission of a development plan is excused if such an application would be an "idle and futile act." [Citations omitted.]

The district court found that this futility exception applied to the Kinzlis' taking claim, and that their claim was therefore ripe for adjudication. *Kinzli*, 620 F.Supp. at 620. However, it is unclear which test the district court applied in determining that submission of a plan would be futile. The district court stated that it believed that the application would be futile if the GBO "deprives plaintiffs of any beneficial use." *Id.* at 617. However, the district court then misapplied the standard by finding that beneficial uses are available under the GBO, *Id.* at 622, yet nevertheless holding that the futility exception applies. *Id.* at 620.

* * *

We reject the district court's view that futility may be determined, absent any rejected development plan, by inquiring whether any

> beneficial use remains or whether the regulatory regime inhibits the property's marketability. Adoption of such standards would require courts to speculate as to what potential uses may be lurking in the hopes of the property owner and in the minds of developers and city planners. This would result in the same sort of speculation that the ripeness doctrine prohibits.
>
> * * *
>
> The Supreme Court has indicated that at least one application must be submitted before the futility exception applies. [Emphasis in original.]

818 F.2d at 1454. In fact, the District Court had held that there was no economically viable use allowed on the property.

B. The Ninth Circuit Misinterpreted This Court's Opinion In *Williamson County v. Hamilton Bank* To Hold That A Formal Application Is Always Required As A Prerequisite To An Inverse Condemnation Suit.

Essentially the Ninth Circuit Court of Appeals mistakenly overextended the ripeness decisions of this Court in *MacDonald Sommer & Frates v. County of Yolo, supra,* and *Hamilton Bank, supra.* As this Court made clear in *First English Evangelical Lutheran Church,* an application is not a condition precedent to all taking claims. The requirement is that there be "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald,* 106 S.Ct.

at 2566. In both *Hamilton Bank* and *MacDonald*, the issue was the allowable density of some urban development on the property. In this action, in contrast, the allowable uses were greenbelt or open space uses. The Ninth Circuit Court of Appeal's extension of the *Hamilton Bank* ripeness rule to require an application for unprofitable open space uses is neither logical nor desirable.

C. When As Here There Is A Factual Finding After Trial That A Further Application For Development Would Be Futile, The Plaintiff Is Not Required To Engage In An Idle Act.

In numerous decisions up to the present time, this Court has reaffirmed the principle that a litigant in a land use case is not required to engage in

useless idle acts and in unfair procedures.

The issues of whether Measure O is a final determination of the "type and intensity of development legally permitted" on Mrs. Kinzli's property is a fact question which was properly determined by the District Court after trial. *MacDonald, Sommers & Frates v. County of Yolo*, ___U.S.___, 106 S.Ct. 2561, 2566 (1986).

In *MacDonald*, this Court stated that "a property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." *Id.* at 2567 n.7.

Where, as here, the property owner proves at trial that there are no economically viable uses of property under an ordinance, it is not necessary that the property owner make a futile application for uses under the ordinance. Nor does the ability of the public entity to repeal the ordinance exculpate it from paying damages for the period of time prior to which it does so.

In *First English Evangelical Lutheran Church*, this Court made clear that the basis for its ruling in *MacDonald Sommer & Frates, supra*, that the claim was not ripe, was that the court below did not believe the allegations of the plaintiff that it had no viable economic use of its property.

107 S.Ct. at 2384. The basis for its decision in *Hamilton Bank* was explained to be that there was still a factual issue regarding what uses would be available. *Id.* In *Hamilton Bank*, the dispute was over the density of residential uses that would be allowed for the property. There was a dispute as to how many units would be allowable.

In the present case the Ordinance, Measure O, prohibited all uses save eight "open space" type uses.- 620 F.Supp. at 613. The District Court analyzed each of those uses at trial and concluded factually that either they were not available or that they would not return a profit to the property owner. 620 F.Supp. at 614-615.

The District Court also held that Measure O contained the clause that stated it could not be amended or altered without a vote of the people. 620 F.Supp. at 613. In fact, the District Court factually held that application for a residential use would have been futile and that there was no use which would interest a prospective purchaser would be allowed under Measure O. 620 F.Supp. at 620.

> Purchasers under conditional sales agreements have made application for a use clearly prohibited under Measure O. They did not pursue the application with any vigor and, indeed, it would have been futile to do so under Measure O. It is unlikely that any modification to the plans could be made that would satisfy the requirements of Measure O and

the GBO and still interest the potential purchasers.

These factual findings were entitled to deference from the Court of Appeals. The question of whether viable economic uses exist for property is solely one of fact, as this Court has repeatedly held. *Keystone Bituminous Coal Assn. v. DeBenedictis, supra* at 1247.

The Ninth Circuit Court of Appeals erred when it applied what it considered to be an essential prerequisite to any taking analysis of applying for a use under the Ordinance, no matter whether said application would be futile. Clearly, as appears from *First English Evangelical Lutheran Church,* an application is <u>not</u> a prerequisite in every case, and specifically is <u>not</u> a

prerequisite in the case here at bar where there is no beneficial use of the property allowed under the Ordinance during the duration.

II.

THE NINTH CIRCUIT COURT OF APPEALS DECISION WILL HAVE THE EFFECT OF PRECLUDING ACTIONS BY PROPERTY OWNERS WHO HAVE BEEN DENIED ECONOMICALLY VIABLE USE OF THEIR PROPERTY BY GREEN BELT OR OPEN SPACE ORDINANCES.

A. The Concept Of Economically Viable Use Requires That The Property Owner Have The Ability To Use The Property In Some Profitable Manner During The Effective Dates Of The Ordinance.

In *First English Evangelical Lutheran Church* this Court made it clear that repeal of an invalid Ordinance does not exculpate a municipality from

compensating the property owner during the period of the interference.

This Court held that temporary takings were not different in kind from permanent takings and that the Constitution requires compensation. Under the rule of *First English Evangelical Church*, the fact that Measure O was an eleven-year ordinance and not permanent does not bar the property owner from proving that there was no economically viable use during the interim.

B. When The District Court Finds As A Matter Of Fact After Trial That The Property Owner Can Make No Profitable Use Of Her Property During The Pendency Of The Ordinance, No Application Is Required.

Measure O, the ordinance applied to the Kinzli property, is a Greenbelt or Open Space Ordinance which singled out Mrs. Kinzli and five other property owners to furnish open space for the benefit of the citizens of Santa Cruz.

When analyzing open space or agricultural preserve zoning, six Justices of this Court, Justices White, Brennan, Marshall, Burger, Powell and Rehnquist have opined in favor of compensation of the affected landowner. *MacDonald, Sommer and Frates v. County of*

Yolo, supra.[1] (White J. dissent, joined by Justices Burger, Powell and Rehnquist dissent.)[2] *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981) (Brennan, J. dissent, joined by Justices Marshall, Stewart and Powell, and *see also,* Rehnquist, J. dissent.)[3]

---

1. The majority opinion in *MacDonald,* was authored by Justice Stevens and joined by Justices Brennan, Marshall, O'Connor, and Blackmun.

2. In *MacDonald,* Justice Byron White wrote a dissent joined in by Chief Justice Burger and as to Parts I, II, and III, joined in by Justices Powell and Rehnquist.

3. Justice Rehnquist in a separate dissent said that he would have no difficulty agreeing with Justice Brennan on the merits of the taking claim if there had been a final judgment of the California Court of Appeals. 450 U.S. at 633-634.

When the decisions of all the Justices in *MacDonald* and in the earlier case *San Diego Gas* are considered it is apparent that a taking has occurred and compensation should be paid when the property was, as here, placed in a open space preserve zoning classification.

In his concurring opinion in *MacDonald*, Justice White took as true the allegations of the plaintiffs' complaint that the property was in reality governed by the City of Davis' agricultural preserve designation. Justice White stated in Part III of his opinion joined by three other Justices:[4]

---

4. Justice Rehnquist, joined by Justice Powell stated:

> "I agree with Justice White that the Court of Appeal's opinion is best read as rejecting appellant's

I agree (with the majority opinion) that land use restrictions may constitute a taking under the Constitution. This resolution of the general question brings me to the more specific question whether the allegations in the complaint here were sufficient to state a takings claim. Here, appellant alleged the existence of a final decision denying it all economically beneficial use of its property. It also alleged that it had paid "good and valuable consideration," App. 43, for

---

allegations as a matter of substantive takings law; that appellant sufficiently alleged a final decision denying it all beneficial use of its property; that a land use regulation restricting the use of property may among to a taking; and that the allegations here are sufficient to state a takings claim. Accordingly, I join Parts I, II, and III of his dissenting opinion."

> the property. Factual allegations of interference with reasonable investment-backed expectations and denial of all economically feasible use of the property are certainly sufficient allegations of a regulatory taking to state a cause of action. See, *e.g.*, *Penn Central*, 438 U.S., at 136-138. Consequently, I would hold that appellant adequately alleged a taking. [Emphasis added.]

In his dissent in *San Diego*, Justice Brennan joined by Justices Marshall, Powell and Stewart, wrote that an overregulation of property even temporary "by virtue of the government's power to rescind or amend the regulation." would be a taking mandating the payment of just compensation.[5]

---

5. The majority in *San Diego Gas*, concluded that there was no final judgment of the California Court as that court had failed to decide

The facts in *San Diego Gas*, were that the City had down-zoned the appellant's property from industrial to agricultural; had designated part of appellant's property as open space[6] and prepared a report mapping appellant's property for purchase by the city for open space. 450 U.S. at 637. Justice Brennan noted:

---

whether or not there was a taking of the appellant's property. 450 U.S. at 632.

6. "Open space" was defined as "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes." *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. at 637, n. 1.

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property ....From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

450 U.S. at 652.

C. The City's Acts In Singling Out Mrs. Kinzli's Property To Remain An Island Of Undeveloped Land In The Middle Of An Urban Area Violate The Fifth Amendment.

As this Court has repeatedly affirmed,

> It is axiomatic that the Fifth Amendment's Just Compensation provision is "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. [Cites omitted.]

Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563 (1960); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-125, 98 S.Ct. 2646 (1978).

Since the decisions from this Court in *Williamson County v. Hamilton Bank* and *MacDonald*, numerous actions involving greenbelt zoning, including this one, have been terminated in federal courts on the basis that the property owner has not applied for a greenbelt use, even though that use is not capable of returning a profit and is not a use that a private

property owner would seek for the property. *See also Santa Fe Land & Development Co. v. Berkeley*, ___F.Supp.___ (N.D.Cal. 1987); *Kaiser Development v. City & County of Honolulu*, 649 F.Supp. 926 (D.Haw. 1987).

The District Courts are obviously uncertain of how to apply this Court's ripeness ruling in the context of open space zoning. Accordingly, they are overreaching and applying the ripeness doctrine to bar legitimate and concrete land use challenges. The lower courts' rulings in such cases as *Kinzli*, *Kaiser* and *Santa Fe Land* lead to absurd results. Specifically, property owners are compelled to apply for uses which are incapable of returning a profit, and

which are quasi-public open space uses, simply to satisfy the ripeness test. The lower courts have treated this Court's language that a "meaningful application" must be filed as an absolute requirement that the owner apply for uses permitted under the challenged open space ordinance. But the fewer uses permitted under the open space ordinance, the less likely it is that the property owner would apply for any of those uses. Thus, from the property owner's viewpoint, such an application is not be a "meaningful application." Such an application if required is a waste of both the public and the property owner's resources.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals is inconsistent with decisions of this Court and has led to an unwarranted limitation on private property rights. For all the reasons herein stated, this petition should be granted and the judgment below reversed.

Dated: November 27, 1987

Respectfully Submitted,

JESS S. JACKSON
BARBARA R. BANKE
50 Francisco St., Suite 445
San Francisco, CA 94133

Barbara R. Banke
Attorney for Petitioner
MARGARET KINZLI, *et al.*